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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 608

MICHAEL KOKIN, GUSTAVE DAVE LANGE and EASTERN FIREARMS COMPANY, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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September 27, 1966.

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in the above-entitled case.

### OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey entered on September 28, 1965 is not officially reported but is reprinted in the

Appendix A hereto, p. 1a, *infra*. The opinion of the Court of Appeals for the Third Circuit, entered on July 29, 1966, is reprinted in the Appendix B hereto, p. 12a, *infra*.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 1966. On timely application, Mr. Justice White on August 25, 1966, signed an order extending the time for filing this petition for writ of certiorari to and including September 27, 1966. On September 1, 1966 petitioners moved the Court of Appeals for the Third Circuit to extend the time within which a petition for rehearing could be filed with the court. The Motion was denied on September 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Where federal agents conceive of, initiate, perpetuate and lure innocent citizens into assisting the agents in the performance of an unlawful act, do such activities constitute "entrapment"?

2. Did the decision below violate the principles of *Cole* v. *Arkansas*, 333 U.S. 196?

3. On conviction for violation of the National Firearms Act, did the Court below err in failing or refusing to consider that: (a) the stipulated facts did not describe a crime; (b) Petitioners were not indicted for the crime adjudged by the trial court; (c) Section 5821 was applicable; (d) Mens rea is a necessary element for conviction for violation of this taxing statute; (e) there is applicable legislative history.

## STATUTORY PROVISIONS INVOLVED

**National Firearms Act, Title 26, United States Code (1954)**

§ 5848(1)

FIREARM.—The term "firearm" means a shotgun or rifle having a barrel of less than 18 inches in length . . . or a machine gun.

§ 5848(2)

MACHINE GUN.—The term "Machine Gun" means any weapon which shoots, or is designed to shoot, automatically or semi-automatically, more than one shot, without manual reloading, by a single function of the trigger.

§ 5811 TAX

(a) RATE.—There shall be levied, collected, and paid on firearms transferred in the United States a tax at the rate of $200.00 for each firearm; . . . The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

BY WHOM PAID.—Such tax shall be paid by the Transferor: PROVIDED, That if a firearm is transferred without payment of such tax the transferor and transferee shall become jointly and severally liable for such tax.

§ 5821 RATE, EXCEPTIONS, ETC.

(a) RATE.—There shall be levied, collected and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of $200.00 for each firearm so made.

(b) EXCEPTION.—The tax imposed by sub-section (a) shall not apply to the making of a firearm, (1) by any

person who is engaged within the United States in the business of manufacturing firearms; (2) from another firearm with respect to which a tax has been paid, prior to such making, under subsection (a) of this section; or (3) for the use of—(A) The United States government, any state, territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, or (B) any peace officer or any federal officer designated by regulations of the secretary or his delegate.

Any person who makes a firearm in respect of which the tax imposed by subsection (a) does not apply by reason of the preceding sentence shall make such report in respect thereof as the secretary or his delegate may by regulations prescribe.

§ 5814 ORDER FORMS

(a) GENERAL REQUIREMENTS.—It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the secretary or his delegate. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this chapter: PROVIDED, That, if the applicant is an individual, such identification shall include finger prints and a photograph thereof.

§ 5802 REGISTRATION

IMPORTERS, MANUFACTURERS, AND DEALERS.—On first engaging in business, and thereafter on or before the first day of July of each year, every importer, manufacturer, and dealer in firearms shall register with the Secretary or his delegate in each Internal Revenue District in which such business is to be carried on his

name or style, principal place of business, and places of business in such district.

§ 5801 TAX

(a) RATE.—On first engaging in business, and thereafter on or before the first day of July of each year, every importer, manufacturer, and dealer in firearms shall pay a special tax at the following rates: . . .

(2) DEALERS OTHER THAN PAWNBROKERS. Dealers, other than pawnbrokers, $200.00 a year or fraction thereof;

## STATEMENT

On July 1, 1964 petitioners were charged in an eight-count indictment with violations of various sections of the National Firearms Act. The indictment complained of two separate transactions, the "Douglas Transaction" and the "Conover Transaction", which were alleged to be sales of "firearms" within the purview of the Act.

On July 29, 1964 the petitioners each entered a plea of not guilty, and on September 31, 1964 trial by jury was waived in each instance and the petitioners consented to trial by the court without jury, on stipulated facts.

Stipulated facts were filed with the trial court on November 23, 1964, a copy of which stipulation is reprinted as part of the opinion of the District Court in Appendix A, p. 2a-7a, *infra*.

The opinion of the District Court filed September 29, 1965 found each of the petitioners guilty on Counts 2, 4 and 6 of the indictment ("Conover Transaction") and not guilty on all other counts ("Douglas Trans-

action"). On February 8, 1966 each of the petitioners was fined $500.00 on Count 2, and imposition of sentence on Counts 4 and 6 was suspended.

It should be noted that the imposition of the fines does not constitute the real damage suffered by these petitioners. This conviction effectively prohibits petitioners from continuing an interstate firearms business.[1]

In the "Douglas Transaction", G. Edward Douglas, a supervisor of the Alcohol and Tobacco Tax Division of the U.S. Treasury Department, obtained by mail from Eastern Firearms Company a price list from which he ordered and received from Eastern an M-1 carbine (which is not a "firearm' 'as defined by § 5848) and various itemized M-2 carbine parts. Douglas, the federal agent, then disassembled the M-1 carbine and using the M-2 parts, assembled a fully operative M-2 carbine. An M-2 carbine if operative is a "firearm". (Stipulated Facts, paragraphs 10 through 14, Appendix A, p. 4a-5a, *infra.*)

The trial court properly held that the simultaneous sale of the M-1 carbine and the enumerated M-2 parts, even assuming they could be readily employed in the construction of an operative M-2 carbine, did not under the statute constitute the sale of an M-2 "firearm". (Appendix A, p. 7a, *infra*)

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[1] Title 15, § 902 (e) provides:

> "It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

The trial court therefore entered a verdict as to all defendants of not guilty of counts 1, 3, 5, 7 and 8 of the indictment.

In the "Conover Transaction", Norman R. Conover, a criminal investigator for the Alcohol and Tobacco Tax Division of the U.S. Treasury Department, visited the business premises of Eastern Firearms Company on August 5, 1963. At that time he unsuccessfully attempted to purchase an M-1 carbine and all of the parts necessary to convert it to an M-2 carbine (the identical materials purchased by Douglas in the "Douglas Transaction").

On October 17, 1963 Conover returned to Eastern Firearms and again attempted unsuccessfully to purchase an M-1 and the M-2 parts. He then left a deposit with petitioner Kokin and requested that Kokin telephone him when all of the items were available.

On November 2, 1963 Conover received a message that the items were available.

On November 4, 1963 Conover finally succeeded in purchasing from petitioner company an M-1 carbine, the desired M-2 parts, an M-1 stock which petitioner Lange altered to fit M-2 requirements and an Army Field Manual on the M-1, M1-A1, M-2 and M-3 carbines.

On November 4, 1963 Conover used the M-1 carbine and the M-2 parts purchased from Eastern to assemble an M-2 carbine which, however, would not operate.

On November 5, 1964[2] Conover took the M-2 carbine

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[2] The date shown in the stipulated facts is obviously incorrect. The events alleged to have occurred on November 5, 1964 occurred several days after November 4, 1963.

which he had assembled to Eastern, and Lange at Conover's request replaced a bent part, made an alteration on the stock and returned the weapon to Conover. Conover subsequently test fired the M-2 and found it would operate as a fully automatic weapon.

The trial court after finding no intent by petitioners to violate the law found them guilty on each count of the indictment which was based on the "Conover Transaction". The court distinguished the "Conover Transaction" from the "Douglas Transaction" by saying that the interest of petitioners in the M-1 and the M-2 parts did not terminate on the sale date but only upon operational assembly in the presence of petitioners on the subsequent date. (Appendix A, p. 9a, *infra.*)

The only question raised initially on appeal to the Third Circuit was:

> "Did not sale of an M-1 carbine and assorted unassembled M-2 gun parts constitute a completed lawful sales transaction outside the purview of the National Firearms Act?"

The Court of Appeals answered, "No." The Court said, contrary to the holding of the trial court in the "Douglas Transaction," that:

> "The sale and transfer of an M-1 carbine . . . with all the parts necessary to convert it into an M-2 carbine . . . constituted such a transfer of a machine gun as the statute contemplates and regulated." Appendix B, pp. 12a-13a, *infra.*

On August 19, 1966 the undersigned Counsel was retained to file the within petition. A motion for an extension of time within which to file a petition for rehearing was promptly filed with the Court of Appeals. Copies of the moving papers and affidavits are re-

printed in the Appendix C, hereto, p. 13a, *infra*. The attention of the Appellate Court was thereby directed to the following vital issues which had not previously been briefed, argued or apparently considered by either the trial or appellate court: (1) The question of federal entrapment in the "Conover Transaction". (2) The failure of the stipulated facts to support the crimes charged in the indictment. (3) Failure to consider the effect of § 5821 of the National Firearms Act dealing with the manufacture of "firearms". (d) Failure to consult the relevant legislative history of the Act particularly respecting the "part or parts" clause. (e) Conviction on a "taxing statute" notwithstanding a specific finding of lack of intent. The motion was denied by the Court of Appeals on September 20, 1966.

## ARGUMENT

### 1. The Stipulated Facts Clearly Establish That Petitioners Were Innocently Entraped by Federal Agents and Are Therefore Not Guilty of the Crimes Charged as a Matter of Law

The defense of entrapment was raised by the not guilty plea of each petitioner. *Sorrels* v. *United States*, 287 U.S. 435, (1932).

According to the stipulated facts,

(1) Norman R. Conover, a criminal investigator for the Alcohol and Tobacco Tax Division of the Treasury Department, visited Eastern Firearms Company on August 5, 1963, at which time he attempted to purchase an M-1 carbine and the parts necessary to convert same into an M-2 carbine. He was advised that they were not in stock.

(2) On October 17, 1963, Conover again visited Eastern Firearms Company, seeking the M-1 carbine and M-2 parts. At that time he left a

deposit for the purchase and requested that he be telephoned when his order was complete. On November 4, 1963 Conover revisited Eastern Firearms Company and purchased the M-1 carbine and the M-2 parts.

(3) On the same day federal agent Conover manufactured a machine gun from the M-1 carbine and M-2 parts, but he was unable to make it operate.

(4) On November 5, 1964, Conover returned to Eastern Firearms Company and obtained the assistance of the individual Petitioners in putting the M-2 carbine which he had manufactured in functioning order.

The District Court made no finding of actual intent by the petitioners to violate the provisions of the National Firearms Act, saying, "such intent is neither manifest in the stipulation or implicit in the single isolated violation at Bar." The petitioners were not in the business of selling machine guns, they were not licensed to sell machine guns, and the court found that they did not intend to transfer a machine gun.

Agent Conover made a legal purchase of an M-1 carbine together with M-2 parts. The purchase was made only after three trips to petitioners place of business by the Federal agent. He, the Treasury Agent, then used the M-1 carbine and M-2 parts to manufacture a machine gun in violation of § 5821 of the National Firearms Act, which provides:

> "There shall be levied, collected and paid upon the making in the United States of any firearm (whether by manufacture, *putting together,* alteration, any combination thereof, or otherwise) a tax at the rate of $200.00 for each firearm so made." (emphasis added)

Agent Conover put the parts together. He made the firearm on November 4, 1963. *A fortiori* it did not exist and could not have been transferred to him earlier that day by petitioners.

Agent Conover subsequently returned to petitioners with the M-2 which he had made from the parts he had purchased and elicited their aid as gunsmiths to put it in operating condition by changing a bent part (a part which could have been deliberately bent by an agent to further enmesh the petitioners).

On the above facts petitioners were convicted of transferring a machine gun in violation of the National Firearms Act.

The crime charged was conceived of by Federal agents. The parts necessary to completion of the criminal act were obtained only by persistent efforts by the Federal agents. The criminal act, manufacture of a machine gun, was accomplished by Federal agents, and the court found that the petitioners never intended to violate the National Firearms Act.

No clearer case of entrapment can be imagined. "The government cannot be permitted to contend that petitioners are guilty of a crime where the government officials are the instigators of their conduct." *Sorrells* v. *United States,* supra. See also *Henderson* v. *United States,* 237 F. 2d, 169, *Banks* v. *United States,* 249 Fed. 672, *Newman* v. *United States,* 299 Fed, 128.

Entrapment occurs when the criminal conduct is the creative activity of law enforcement officials. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. *Sherman* v. *United States,* 356 U.S. 369 (1958).

> "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it." *Butts* v. *United States*, 273 Fed. 35.

The first and chief endeavor of Federal Agent Conover was to create a crime by petitioners in order to punish it. It is unconscionable and contrary to public policy, and to the established law of the land to punish petitioners for the commission of an offense of the like of which they had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded and lured them into innocent commission.

This issue was not argued before the District Court or Court of Appeals, and neither court considered it in its opinion. The attention of the Court of Appeals to this clear issue was elicited, however, in petitioners motion to extend the time within which a petition for rehearing could be filed. (Appendix C, *supra*). The Court denied the motion thereby precluding the detailed investigation of authorities demanded by the stipulated facts.

So clear is the existence of Federal entrapment on the face of the stipulated facts as to warrant the exercise of this Court's jurisdiction and outright reversal of the judgments of conviction.

**2. The Decision Below Violates the Principle of Cole v. Arkansas, 333 U.S. 196**

Petitioners clearly were entitled, as a matter of due process, to have the validity of their convictions appraised by the Court of Appeals, "on consideration of the case as it was tried and as issues were determined

in the trial court." *Cole* v. *Arkansas*, 333 U.S. 196, 202. But that principle was egregiously violated by the court below.

The trial court found petitioners guilty of transfering a fully operable M-2 carbine, which is a "firearm". Said transfer was made, according to the court's interpretation of the stipulation of facts, on November 5, 1964. The Court of Appeals ostensibly affirmed the verdict of the trial court but found that petitioners were guilty of selling an M-1 carbine and the parts necessary to convert it to an M-2 carbine, which event occurred according to the stipulation of facts, on November 3, 1963. The items transferred as found by the trial court and the Court of Appeals are different, the dates of transfer are different and the crimes are different.

The affirmance below was premised on an offense described as follows:

> "On the merits, the principal question presented by this appeal is *whether,* in the circumstances of this case, *the sale and transfer of an M-1 Carbine, itself not a machine gun together with all the parts necessary to convert it into an M-2 Carbine, a type of machine gun, constituted such a transfer of a machine gun,* as the statute contemplates and regulates . . . we are satisfied that . . . the appellants have violated the law." (Emphasis added) Appendix B, p. 12a, *infra.*

But appellants were not convicted by the trial court on the theory that transfer of an M-1 together with the parts necessary to convert it into an M-2 constituted a transfer of a machine gun, for the trial court specifically held that such a transfer is not, "proscribed by the letter of the Act."

The trial court in finding petitioners not guilty of counts 3, 5 and 7 of the indictment ("Douglas Transaction") said:

> "We examine first the Agent Douglas transaction. There it is apparent that the violation—if committed at all—must have resulted from the simultaneous mailing of the M-1 carbine and M-1 stock plus the enumerated M-2 carbine parts. *Assuming that these various elements could be readily employed in the construction of an operative M-2 carbine rifle, the court cannot find the presence of such a weapon in the sale itself.*" (Emphasis added).

Defendants-Appellants were found guilty by the trial court on counts 2, 4 and 6 ("Conover Transaction") based upon a finding that:

> "The facts demonstrate an unbroken commercial interest on the part of defendant vendors for some three months in overseeing the actual realization of that weapon. This interest was in no way severed or satisfied on a mere transfer of the basic unfitted components to Conover (the Federal agent). Rather, it is clear, *the interest terminated only upon operational assembly by and in the presence of defendants.* Only at this point did Conover obtain what he had bargained for—an M-2 carbine automatic rifle." (Emphasis added).

According to the stipulated facts, Agent Conover purchased the M-1 and M-2 carbine parts from defendants-appellants on November 4, 1963. The Third Circuit Court of Appeals affirmed the conviction of the District Court on the ground that said sale constituted a crime. The District Court however, found no such crime. Petitioners were convicted by the trial court for

the events which occurred according to the stipulated facts on November 5, 1964 at which time petitioners assisted Agent Conover in putting the weapon, which he (Conover) had previously assembled, in functioning order.

The Third Circuit Court of Appeals has ostensibly affirmed conviction for a criminal act on November 4, 1963. The trial court on the other hand found petitioners guilty of a crime which occurred on November 5, 1964 (sic). Each court applying a different interpretation of the elements of the offense.

Petitioners were thereby deprived of their rights to have their conviction reviewed on the same basis of the theory of conviction by the trial court and the failure of the Circuit Court of Appeals so to do is so grossly violative of the principles of *Cole* v. *Arkansas* supra as to call for reversal.

**3. The Courts Below Erred in That: (a) the Facts as Stipulated Fail To Describe Any Criminal Act by Petitioner; (b) Petitioners Were Not Indicted for the Crime Adjudged by the Trial Court; (c) the Manufacture Tax Section of the National Firearms Act § 5821 Was Not Considered; (d) Petitioners Were Convicted of Violating a Taxing Statute Without Intent; (e) Relevant Legislative History Was Not Considered; (f) the Court of Appeals Refused Petitioner's Motion for Extension of Time Within Which To Petition for Rehearing**

(a) The facts as stipulated fail to describe any criminal act by petitioners.

Paragraphs 7 and 8 of the stipulated facts state:

> "7. On November 4, 1963, in the presence of Investigator Carl Windsor, Alcohol & Tobacco Tax Division, Newark, New Jersey, Conover assembled an M-2 carbine using the M-1 carbine and the M-2

parts which he had purchased from Eastern Firearms, using the Field Manual as a guide. When assembled, the weapon would not function properly because of a bent and worn disconnector lever assembly.

8. On November 5, 1964, Conover returned to Eastern Firearms with a completely assembled M-2 carbine, separated from the stock. Defendant Lange who was in the store, examined the M-2 carbine, determined that the disconnector lever assembly was faulty, and replaced the assembly with a new one. Defendant Lange handed the M-2 carbine back to Conover, and Conover attempted to fit it into the M-1 carbine stock. He could not accomplish this and defendant Lange altered the stock, assembled the weapon into the stock, checked the functioning, and returned the weapon to Conover. Conover then purchased a box containing 50 rounds of U.S. Government 30-caliber carbine ammunition from defendant Lange. Conover separated the M-2 carbine action from the stock and then left the store with the weapon."

Unless Agent Conover paid a tax of $200.00 on November 4, 1963 or on November 5, 1964, the above facts would appear to support an indictment against him for manufacture of a firearm without payment of tax contrary to § 5821, Title 26, U.S.C. which states:

"There shall be levied, collected and paid upon the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise) a tax at the rate of $200.00 for each firearm so made."

Perhaps petitioners were guilty on November 5, 1964 (sic) of aiding Conover in manufacturing a "firearm", but they have not been indicted for that. If as the trial court concluded the firearm was not manu-

factured until November 5, 1964 (sic), at which time the parts were owned by Conover, the "firearm" obviously had no independent existence prior to that date, and the petitioners could not have transferred it on November 4, 1964 as alleged in the indictment.

If as the trial court states simultaneous sale of an M-1 and of M-2 parts does not constitute sale of a "firearm" then no criminal activity can be found in the stipulation of facts except that which relates to Conover's apparent illegal manufacture of the M-2 carbine.

(b) Petitioners were not indicted for the crime adjudged by the trial court.

Count 2 of the Indictment charges that on November 4, 1963 the defendants "did knowingly and unlawfully transfer a firearm as defined in 26 U.S.C. 5848(2), in violation of 26 U.S.C. 5811(a)."

Count 4 charges transfer of a firearm on November 4, 1963 in violation of 26 U.S.C. 5814, and count 6 charges unlawfully dealing in firearms on November 4, 1963, without registration, as required by 27 U.S.C. 5802.

The Trial Court, whose opinion was affirmed by the Court of Appeals, after declaring that a mere sale of an M-1 carbine and the M-2 parts necessary to convert it to an M-2 is not the sale of a firearm under the National Firearms Act, found that with respect to the Conover transaction, the interest of the defendants-appellants "terminated only upon operational assembly by and in the presence of the defendants. Only at that point did Conover obtain what he had bargained for." The interest terminated, therefore, and the sale took place,

according to the Court, on November 5, 1964 for, according to the Stipulated Facts, the weapon was not made operational until that date—after the parts were sold on November 4, 1963. The Courts decision, therefore, cannot be reconciled with the indictment alleging commission of the crimes on November 4, 1963, which is the date the parts were sold. The defendants cannot be found guilty of a crime for which no opportunity for defense has been afforded, and no indictment filed.

(c) The Manufacture Tax Section of the National Firearms Act § 5821(a) was not considered.

Section 5821 of the National Firearms Act provides that:

> "there shall be levied, collected and paid upon the making in the United States of any firearm (either by manufacture, putting together, alteration, any combination thereof, or otherwise), a tax at the rate of $200.00 for each firearm so made."

The National Firearms Act is a taxing statute, *Sonzinsky* v. *United States,* 300 U.S. 506 (1937), and is collaterally designed to establish a Federal register of certain kinds of weapons which are defined to be "firearms". The petitioners were indicted, tried and convicted for transferring a firearm without having paid a tax of $200.00 in accordance with 28 U.S.C. 5811(a). If, rather than transferring an operable machine gun, parts for such a weapon are transferred, no tax is due until those parts are assembled into an operable weapon, at which time the Government has an interest in being notified of the existence of the new "firearm" and the tax is due and payable by the person who made the firearm "either by manufacture, putting together, alteration, any combination thereof, or otherwise." The Stipulated Facts in the captioned matter

make it clear that the firearm first came into being in Conover's hands and he had a duty to file the requisite forms and pay the required tax for manufacture on November 4, 1963, when he first attempted to manufacture a machine gun from the material purchased from the petitioners, or at the latest on November 5, 1964, when he finally succeeded in his efforts, with the assistance of the petitioners. The individual petitioners may be guilty of assisting him to violate the National Firearms Act in manufacturing the machine gun, but they cannot, as the law is written, be guilty of selling a firearm on November 4, 1963. The "firearm" was manufactured subsequent to that date.

(d) Petitioners were convicted of violating a taxing statute without intent to commit a crime.

Each and every count of the Indictment alleges that the acts complained of were knowingly and unlawfully perpetrated. The Opinion of the Trial Court says as a fact that the defendants had no criminal intent. The cases cited in the decision of the trial court relating to intent turn on other sections of the National Firearms Act. The conviction in the instant case turns on innocent failure to pay a tax. The element of intent should be reconsidered in that light.

(d) Relevant legislative history was not considered.

From the history of the National Firearms Act it is readily apparent that its coverage was intended to differ from the Federal Firearms Act, which deals with pistols, etc. One of the differences is the inclusion in the Federal Firearms Act of an "any part or parts" clause. This construction is buttressed by *U.S.* v. *Tott*, 42 F. Supp. 252, affirmed 3 Circuit 131 F. 2d 261, a case

involving the construction of the Federal Firearms Act. The Court there noted that the "earlier National Firearms Act (of 1934) lawfully in *pari materia* was under discussion during the enactment process of the 1938 (Federal Firearms) Act." The 1938 Act originally, like the 1934 Act, contained no "part or parts clause". These words were added to the Federal Firearms Act later by specific amendment. No such amendment was added to the 1934 Act. Evaluation of this legislative history is essential to proper disposition of the instant case.

(f) The Court of Appeals refused petitioners' motion for extension of time within which to petition for rehearing. All of the above stated questions were raised in the petitioners' motion to the Court of Appeals for the Third Circuit to extend the time within which to file a petition for rehearing. Counsel was changed between the time of the argument before the Third Circuit and the filing of this petition, and as was pointed out to the court below at the time present counsel was retained, the time for filing a petition for rehearing had already expired and none of the vital questions discussed above had been considered by the court. It was within the court's discretion to extend the time to file a petition for rehearing and to afford the petitioners an opportunity to have these questions considered. The court below abused this discretion in failing to grant the additional time; and the case should be remanded with additional instructions to consider all of the legal issues raised herein which had been raised by the aforesaid motion.

## CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

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